(1) SUPREME COURT U.S.
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No. _____

In The
Supreme Court of the United States

WILLIAM LEADER,
Petitioner,

v.

DIRECTOR, CALIFORNIA DEPARTMENT OF CORRECTIONS; LEROY D. BACA, SHERIFF; LA COUNTY JAIL; PEOPLE OF THE STATE OF CALIFORNIA,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Question 1

STARTING THE AEDPA CLOCK

Whether the state appellate process does not become final for purposes of AEDPA calculations until this Supreme Court of the United States is allowed its right to consider for 90 days subsequent to the final judgment date, the final judgment of a lower state court which was subject to discretionary review, although the final sentence from which the final judgment date was derived 30 days later, was never appealed to any higher state court, there never being a denial of review of that sentence thereby, and although certiorari of that final judgment was not at that time sought?

Question 2

FINAL JUDGMENT

Whether there exists a legitimate final judgment on a case in which the sentence on one count in that case is properly and timely appealed, but no appellate court ever rules on this appealed count's sentence, nor states on the record a reason for not so doing, and consequently no trial court ever re-sentences that particular count.

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INTRODUCTORY PRAYER

William Leader prays that a Writ of Certiorari issue to the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the court of appeals is not reported but is reproduced in the Appendix ("App.") at 1a. The opinion of the District Court for the Central District of California denying a request for a certificate of appealability is not reported but is reproduced at App. 2a. The district court opinion accepting the magistrate's report and recommendation is not reported but is reproduced at App. 4a. The magistrate's report and recommendation is reproduced at App. 7a.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). On **September 24, 2007**, the United States Court of Appeals for the Ninth Circuit in case No. 07-55640 ordered that: "The request for a certificate of appealability is denied. *See* 28 U.S.C. Section 2253(c)(2). All outstanding motions are denied." (D.C. No. CV-06-06616-SVW, Central District of California, Los Angeles).

STATUTORY PROVISION INVOLVED

28 U.S.C. Section 2244(d)(l)(A):

> A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of – (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

STATEMENT OF THE CASE

On September 24, 2007, the United States Court of Appeals for the Ninth Circuit in case No. 07-55640 ordered that the request for a certificate of appealability be denied. The **United States District Court denied and dismissed a Petition for a Writ of Habeas Corpus**, No. CV 06-6616-SVW (CT), ruling that the federal petition filed on October 18, 2006, was untimely, **consequent to that court *not* adding to its time calculations the 90 day period at issue here in question 1 *supra***, and ignoring that count 3's sentence, though properly and timely appealed on June 25, 2004, was left forever in limbo without ever being ruled upon on January 12, 2005, or ever by Appellate Department or by any other court. Review of the final trial court sentence on April 28, 2005, was never sought by an appeal.

Since these 14 wobbler misdemeanors were filed *ab initio* as misdemeanors, and never later amended to

felonies, petitioner argued each one was barred by a 1-year statute of limitations.

The California legislature on 09/20/2006, enacted Assembly Bill 2198 amending California's Health and Safety Code § 11156, the statute on which each of these 14 misdemeanors were based, revising the prohibition against physicians prescribing a controlled substance to an addict or habitual user, by deleting the reference to habitual user, and declaring that the under-treatment of pain is a continuing problem in California.

REASONS FOR GRANTING THE PETITION OR WRIT

I. IMPORTANCE OF QUESTIONS

An answer to question 1 seems important since this country's prisoners, courts, judges, and attorneys, all require clear guidelines on the time limits for the filing of federal habeas corpus petitions. An answer to question 2 seems important since confusion seems to arise often as to the date of final judgments, as evidenced in this case.

II. CONFLICTS

California's Criminal Appellate Practice Manual, ©2006, Appellate Defenders, Inc. on Federal Habeas Corpus, at page 8, in its section A, states under its:

AEDPA TIME LIMITS FOR FILING FEDERAL PETITION, *Starting the Clock*. Section. [9.5]:

> The most common trigger for starting the limitations clock is the conclusion of direct review or expiration of the time for seeking it. (28 U.S.C. Section 2244(d)(1)(A).) As applied to California, the state appeal process includes time for petitioning for review in the California Supreme Court and for certiorari in the United States Supreme Court. The state appeal process is final at the end of the 90-day period in which to file a certiorari petition after the denial of review or, if certiorari is sought, at the time the court acts on it. (E.g., *Beard v. Banks* (2004) 542 U.S. 406, 411; *Caspari v. Bohlen* (1994) 510 U.S. 383, 390; *Bowen v. Roe* (9th Cir. 1999) 188 F. 3d 1157, 1158-1159; see also *Clay v. United States* (2003) 537 U.S. 522, 525 [similar timing for a 28 U.S.C. section 2255 motion for relief from federal convictions]; caveat: see *White v. Klitzkie* (9th Cir. 2002) 281 F.3d 920, 924-925 [in contrast to rule applicable to appeal, certiorari from denial of state habeas petition is not part of state *collateral* proceedings].)

Even if a petitioner does not seek review directly of a final judgment of a lower court, does this Supreme Court not have a right *sua sponte* to review the state's final judgment for 90 days subsequent to that judgment? If this Court does, whether or not those 90 days get added for starting the AEDPA limitations' clock is the subject of question 1. Or alternatively, was petitioner not eligible to petition for certiorari on the lower trial court's final judgment although he did not

appeal that lower court's final sentence which formed the basis of that final judgment?

"It is a fundamental characteristic of our federal system that this court has appellate jurisdiction over state-court decisions implicating federal law or the constitution. Until we have exercised that jurisdiction or declined to do so, the case is not finally decided", quoted from Judge Ginsburg in dissent in *Lawrence v. Florida*, 127 S. Ct. 1079, 166 L. Ed.26 924, 75 USLW 4095, 07 Cal. Daily Op. Serv.1762, 20 Fla. L. Weekly Fed S 84 (US, Feb 20, 2007)(No.05-8820).

28 U.S.C. § 2244(d)(1)(A) needs to be read with historical practice in mind. The unbroken line of cases in which this Supreme Court of the United States has expounded the importance of its jurisdiction to review state court decisions that implicate federal law must not be ignored. This Supreme Court's role must not be effectively read out of the state judgment process by the lower federal courts, as has been done in this case so far, losing sight of the fact that "the time honored practice of appellate review of state-court judgments [is] consistent with this Court's role in our federal system." *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco*, 496 U.S. 18, 28 (1990).

CONCLUSION

This petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 07-55640

[Filed September 24, 2007]

WILLIAM LEADER, Petitioner-Appellant, v. DIRECTOR, CALIFORNIA DEPARTMENT OF CORRECTIONS; et al., Respondents-Appellees.	)

ORDER

Before: PREGERSON and RAWLINSON, Circuit Judges.

The request for a certificate of appealability is denied. *See* 28 U.S.C. § 2253(c)(2). All outstanding motions are denied.

APPENDIX B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CV 06-6616-SVW (CT)

[Filed May 10, 2007]

WILLIAM LEADER, Petitioner,	)
v.	)
DIRECTOR, CALIFORNIA DEPT. OF CORRECTIONS, LEE BACA, SHERIFF, LOS ANGELES COUNTY, Respondents.	)

ORDER DENYING REQUEST FOR CERTIFICATE OF APPEALABILITY

On April 25, 2007, petitioner filed a notice of appeal and request for a certificate of appealability. *See* 28 U.S.C. § 2253.

The court finds that petitioner has not shown that jurists of reason would find it debatable whether this court was correct in its procedural ruling for the reasons stated in the Report and Recommendation filed on January 29, 2007 and the Order Accepting the

Magistrate Judge's Report and Recommendation filed on April 12, 2007 and entered on April 17, 2007. *See* 28 U.S.C. § 2253; Fed. R. App. P. 22(b) ; *see also Slack v. McDaniel*, 529 U.S. 473, 484-85 (2000) .

IT IS THEREFORE ORDERED that the request for issuance of a certificate of appealability is denied.

DATED: MAY 10 2007

/s/
STEPHEN V. WILSON
UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CV 06-6616-SVW (CT)

[Filed April 12, 2007]

WILLIAM LEADER, Petitioner,	)
v.	)
DIRECTOR, CALIFORNIA DEPT. OF CORRECTIONS, LEE BACA, SHERIFF, LOS ANGELES COUNTY, Respondents.	)

ORDER ACCEPTING MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

Pursuant to 28 U.S.C. § 636, the court has reviewed the entire file de novo, including the magistrate judge's report and recommendation and petitioner's objections.[1]

[1] In his objections, petitioner states that on September 20, 2006, after his last state habeas petition was denied, California substantially amended the statute under which petitioner was

The court concurs with the magistrate judge's report and recommendation that the petition is time-barred.

ACCORDINGLY, IT IS ORDERED THAT:

1. The report and recommendation is accepted.

2. Judgment shall be entered consistent with this order.

3. The clerk shall serve this order and the judgment on all counsel or parties of record.

DATED: 4/12/07

/s/
STEPHEN V. WILSON
UNITED STATES DISTRICT JUDGE

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convicted. To the extent that petitioner is attempting to raise a new ground for relief in his objections, the court declines exercise its discretion to consider this new ground, which has not been exhausted in state court. *See United States v. Howell*, 231 F.3d 615, 621-22 (9th Cir. 2000) (district court has discretion, but is not required to, consider evidence or allegations raised for the first time in the objections). Even if this court were to consider this new ground, a non-retroactive change in state law would not warrant habeas relief. *See Wainwright v. Stone*, 414 U.S. 21, 23-24 (1973) (principles of comity allow state courts to determine whether decisions changing the law operate retroactively); *see also Fiore v. White*, 531 U.S. 225, 227 (2001) ("'state courts are under no [federal] constitutional obligation to apply their decisions retroactively'") (citation omitted).

APPENDIX D

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CV 06-6616-SVW (CT)

[Filed April 12, 2007]

WILLIAM LEADER,
Petitioner,

v.

DIRECTOR, CALIFORNIA DEPT. OF CORRECTIONS, LEE BACA, SHERIFF, LOS ANGELES COUNTY,
Respondents.

JUDGMENT

Pursuant to the Order Accepting the Magistrate Judge's Report and Recommendation,

IT IS ADJUDGED that the petition is denied and dismissed with prejudice.

DATED: 4/12/07

/s/
STEPHEN V. WILSON
UNITED STATES DISTRICT JUDGE

APPENDIX E

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CV 06-6616-SVW (CT)

[Filed January 29, 2007]

WILLIAM LEADER,
Petitioner,

v.

DIRECTOR, CALIFORNIA DEPT. OF CORRECTIONS, LEE BACA, SHERIFF, LOS ANGELES COUNTY,
Respondents.

MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION ON PETITION FOR WRIT OF HABEAS CORPUS

This report and recommendation is submitted to the Honorable Stephen V. Wilson, United States District Judge, pursuant to the provisions of 28 U.S.C. § 636 and General Order 194 of the United States District Court for the Central District of California. For the reasons discussed below, it is recommended that the petition be DENIED AND DISMISSED WITH PREJUDICE.

THE CURRENT PROCEEDINGS

On October 18, 2006, petitioner William Leader ("petitioner"), in state custody (house arrest) and proceeding *pro se*, filed a federal petition for writ of habeas corpus challenging his January 31, 2001 state court misdemeanor conviction. On December 21, 2006, respondents filed a motion to dismiss on the ground that the petition was time-barred. On January 4, 2007, petitioner filed an opposition to the motion to dismiss.

SUMMARY OF PRIOR PROCEEDINGS

On January 31, 2001, a jury convicted petitioner of fourteen counts of violating California Health and Safety Code section 11156 (prescribing a controlled substance to an addict or habitual user). (Motion to Dismiss, Ex. A at 36-38). On February 5, 2001, the court sentenced petitioner to five consecutive one-year sentences on Counts 1, 2, 12, 13, and 14 and the sentence was suspended on the remaining counts. (Motion to Dismiss, Ex. A at 39-41). On the same day, petitioner filed a notice of appeal to the Appellate Division of the Los Angeles Superior Court ("Appellate Division").[1] (*Id.* at 41). Petitioner subsequently was released on bail pending the resolution of his appeal. (Motion to Dismiss, Ex. A at 41-42).

On November 21, 2002, the Appellate Division affirmed the conviction on all counts but reversed and

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[1] All appeals from appealable orders in misdemeanor cases are heard in the appellate divisions of the superior courts. Cal. Const. Art VI § 11; Cal. Penal Code §1466.

remanded the sentences imposed. (Petition, Ex. 8 at 130-35; Motion to Dismiss, Ex. B).

The trial court held a second sentencing hearing on May 8 and 9, 2003. (*See* Motion to Dismiss, Ex. A at 47-48). At that time petitioner made what was essentially a motion for a new trial or dismissal alleging instructional error and statute of limitations issues. (Petition, Ex. 21). The court denied the motion and resentenced petitioner. (Motion to Dismiss, Ex. C at 60, 71-72, 77-82).

Petitioner filed a second appeal in the Appellate Division seeking direct review of his sentence and the denial of his motion.(*See* Petition, Ex. 22). The Appellate Division declined to rule on the denial of the motion, holding that it had no jurisdiction to do so, and affirmed in part, and reversed and remanded in part, petitioner's sentence. (Petition, Ex. 25).

Meanwhile, petitioner filed in the California Court of Appeal a petition to transfer his appeal to the Court of Appeal, a petition for writ of habeas corpus, and a petition for writ of mandate, all of which were summarily denied. (Petition, Exs.17, 18, 28-30, 33, and 34). Petitioner filed petitions for review of those decisions in the California Supreme Court, which were denied. (Petition, Exs. 19, 20, 31, 32, and 35; Motion to Dismiss, Ex. D).

Subsequently, on April 28, 2005, the trial court sentenced petitioner to one day in county jail for each count on Counts 4-11, 13 and 14 to run concurrent with the three-year sentence on Counts 1, 2, and 12 that had been imposed on May 9, 2003 and affirmed on

January 12, 2005.[2] (Motion to Dismiss, Ex. A at 51). Petitioner did not appeal this judgment.

On June 9, 2005, petitioner began his first round of collateral review after his final sentencing by filing a petition for writ of habeas corpus in the Los Angeles Superior Court. (Petition, Ex. 36). The court denied the petition on June 14, 2005. (Petition, Ex. 37; Motion to Dismiss, Ex. A at 52).

Ten months later, on April 20, 2006, petitioner filed a petition for writ of habeas corpus in the California Court of Appeal, raising the same four issues that he raised in his habeas petition to the Los Angeles Superior Court. (Petition, Ex. 38; Motion to Dismiss, Ex. E). The court of appeal denied the petition on May 2, 2006 without comment or citation to authority. (Petition, Ex. 39).

On May 11, 2006, petitioner filed a petition for writ of habeas corpus in the California Supreme Court. (Petition, Ex. 40; Motion to Dismiss, Ex. F). The petition raised the same four issues that he raised in his previous habeas petitions. The California Supreme Court summarily denied the petition on June 21, 2006 with citations to *In re Waltreus*, 62 Cal.2d 218 (1965);

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[2] On May 9, 2003, the trial court suspended petitioner's sentence on Count 3 and ordered probation conditioned on petitioner surrendering May 13, 2003 and obeying all laws. The court ordered bail. Petitioner's probation was subsequently terminated on May 13, 2003 when he surrendered as ordered and posted bail. (Motion to Dismiss, Ex. A at 48).

In re Miller, 17 Cal.2d 734 (1941) and *In re Clark*, 5 Cal.4th 750 (1993). (Petition, Ex. 41).

Petitioner started a second round of collateral review in state court on July 18, 2006, by filing a petition for writ of habeas corpus in the California Supreme Court. (Petition, Ex. 42). The petition raised two new claims and was summarily denied by the California Supreme Court on August 16, 2006 with citations to *In re Robbins*, 18 Cal.4th 770, 780 (1998); *In re Clark*, 5 Cal.4th 750 (1993); and *In re Dixon*, 41 Cal.2d 756 (1953). (Petition, Ex. 43 at 690).

While petitioner's habeas petition to the California Supreme Court was pending, he filed a federal petition for writ of habeas corpus in this court in case number CV 06-4610-SVW (CT). That petition was dismissed without prejudice on September 11, 2006 because petitioner's state habeas petition to the California Supreme Court was still pending at the time the federal petition was filed. *See Sherwood v. Tomkins*, 716 F.2d 632, 634 (9th Cir. 1983) (where there is a pending post-conviction proceeding in state court, the exhaustion requirement is not satisfied); *see also Gatlin v. Madding*, 189 F.3d 882, 889 (9th Cir. 1999) (time to assess exhaustion is when the federal habeas petition is filed).

This federal petition followed.

CONTENTIONS

Petitioner essentially raises the following grounds for habeas relief:

1. The state court lacked jurisdiction to convict petitioner of the crimes charged because the statute of limitations on those charges had run;

2. Trial and appellate counsel rendered constitutionally ineffective assistance when they failed to object to jury misinstructions;

3. The jury verdicts were inconsistent and violated petitioner's due process rights; and,

4. The trial court's order suspending petitioner's medical license pending his appeal violated the Eighth Amendment excessive bail provision.

(Petition at 5-18). Respondents contend that the petition is time-barred.

DISCUSSION

The Anti-Terrorism and Effective Death Penalty Act ("AEDPA") imposes a one-year period of limitation for prisoners in state custody to file a federal petition for writ of habeas corpus. *See* 28 U.S.C. § 2244(d)(1). The one-year period of limitation generally runs from the later of the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review, and is tolled only during the period of time in which a "properly filed" application for state post-conviction or other collateral review is pending. 28 U.S.C. § 2244(d)(1)(A), (d)(2).

Here, although petitioner was originally convicted by the jury on January 31, 2001 and the jury's

conviction was affirmed on November 21, 2002, petitioner's final sentence, after the Appellate Division twice remanded for resentencing, was not imposed until April 28, 2005.[3] Petitioner had 30 days to file an appeal of the judgment. *See* Cal. Rules of Court, Rule 182(a). He did not do so and his conviction became final on May 28, 2005.[4] The statute of limitations

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[3] Petitioner contends that there has been no final judgment in his case because the sentence on Count 3 was never addressed on appeal. This court disagrees. (*See* Motion to Dismiss, Ex. A at 48; Petition, Ex. 25 at 228). Petitioner alternatively contends that his judgment is not final because he disagrees with the California courts' rejection of his argument that the statute of limitations ran on the charges against him, This argument is similarly unavailing.

[4] Petitioner contends that his conviction was not final until 90 days after the judgment. When a habeas petitioner seeks direct review of a judgment of conviction in the state's highest court, but thereafter does not seek a petition for writ of certiorari, the period of "direct review" in 28 U.S.C. § 2244(d)(1)(A) includes the 90-day period within which a petitioner can file a petition for a writ of certiorari. *Bowen v. Roe*, 188 F.3d 1157, 1158-59 (9th Cir. 1999). Respondents argue that petitioner's conviction, as opposed to his sentence, became final on May 24, 2005, or 90 days after the court of Appeal denied his request to transfer the case after the Appellate Division entered its final decision on appeal. (Motion to Dismiss at 13 n. 7). However, the trial court did not issue petitioner's final sentence until April 28, 2005. Petitioner did not seek direct review of that sentence. Accordingly, his judgment became final – at the latest – when the time for filing a notice of appeal from that sentence expired. *See Smith v. Duncan*, 297 F.3d 809, 812-13 (9th Cir. 2002) (where petitioner sought no direct review from court of appeal decision, his conviction became final

began to run the following day, and a properly filed federal petition was due one year later, on or about May 30, 2006.[5] *See Patterson v. Stewart*, 251 F.3d 1243, 1246 (9th Cir. 2001) (holding Fed. R. Civ. P. 6(a) applies to petitions subject to the AEDPA). Petitioner's federal petition was filed almost five months later on October 18, 2006. Accordingly, based on foregoing calculation, petitioner's federal petition is time-barred absent tolling.

1. Statutory Tolling

Under AEDPA, the period of limitation is tolled while a "properly filed" application for state post-conviction or other collateral relief is pending. 28 U.S.C. § 2244(d)(2). So long as subsequent applications for appellate collateral review are filed within a "reasonable time" after the lower court's decision, an application for post-conviction review is "pending" while a California petitioner completes a full round of state collateral review. *Carey v. Saffold*, 536 U.S. 214, 222 (2002) (AEDPA's tolling rule "modifies the 1-year filing rule (a rule that prevents prisoners from delaying their federal filing) in order to give States the opportunity to complete one full round of review, free of federal interference"). Thus, the time an application for post-conviction relief is "pending" also includes the interval between the disposition of a post-conviction

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under 28 U.S.C. § 2244(d)(1)(A) forty days later when the time for seeking direct review in the California Supreme Court expired).

[5] May 28, 2006 was a Sunday and May 29, 2006 was a holiday, so petitioner would have had until the Tuesday, May 30, 2006, to file his petition. Fed.R.Civ.P. 6(a).

habeas petition and the filing of an appeal or habeas petition at the next state appellate level. *Id.* at 223-226 ("intervals between a lower court decision and a filing of a new petition in a higher court [are] within the scope of the statutory word 'pending'" unless the petitioner delayed unreasonably). *See also Delhomme v. Ramirez*, 340 F.3d 817, 819 (9th Cir. 2003) (citing *Carey v. Saffold*, 536 U.S. at 224, 226).

Here, petitioner began his first round of collateral review by filing a habeas petition in the superior court on June 9, 2005, ten days after his conviction became final. (Petition, Ex. 36).[6] That petition was denied five days later on June 14, 2005. (Petition, Ex. 37). Petitioner then waited more than ten months - until April 20, 2006 – to file his second petition in the California Court of Appeal. (Petition, Ex. 38, Motion to Dismiss, Ex. E). The California Court of Appeal denied his petition on May 2, 2006 without comment or citation to authority. (Petition, Ex. 39).

Where, as here, the California court does not give a clear indication that a particular request for appellate review was timely or untimely, the federal court must itself examine the delay and determine what the state courts would have held in respect to timeliness. *Evans v. Chavis*, 546 U.S. 189, 126 S.Ct.

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[6] Prior to his final sentence, petitioner filed a number of petitions in the California Court of Appeal, and sought review of the court of appeal's decisions in the California Supreme Court. (*See* Petition, Exs. 17-20, 28-35). Because these petitions were decided prior to petitioner's final sentence, they do not impact the statute of limitations analysis.

846, 852 (2006). The Supreme Court has held that an unexplained delay of six months between California habeas petitions was unreasonable and did not fall within the scope of the statutory word "pending" for the purpose of tolling the statute of limitations under 28 U.S.C. § 2244(d)(2). *Id.* at 854. *See also Gaston v. Palmer*, 447 F.3d 1165, 1167 (9th Cir. 2006) (an unexplained delay of ten months was "unreasonable"). Based on the foregoing authority and the court of appeal's silence as to the timeliness of petitioner's April 20, 2006 petition, this court finds that petitioner's ten month delay in filing that petition was unreasonable and petitioner is not entitled to statutory tolling during that ten month interval.

Petitioner filed his next habeas petition in the California Supreme Court on May 11, 2006. (Petition, Ex. 40; Motion to Dismiss, Ex. F at 88). Respondents concede that petitioner is entitled to statutory tolling for the interval in between the denial of his petition to the court of appeal and filing his May 11, 2006 petition to the California Supreme Court. Assuming petitioner receives tolling for this interval, petitioner is entitled to a second period of statutory tolling from April 20, 2006, when he filed his petition in the California Court of Appeal, until June 21, 2006, when the California Supreme Court denied his petition. (Petition, Ex. 41).

Petitioner then began a second round of collateral review by filing a second habeas petition in the California Supreme Court asserting two new grounds. (Petition, Ex. 42). Although the statute of limitations is tolled while a petitioner completes "one full round" of state collateral review, the statute of limitations is *not* tolled during the gap between the completion of

one full round of state collateral review and the commencement of another round. *Delhomme v. Ramirez*, 340 F.3d at 820; *see also Biggs v. Duncan*, 339 F.3d 1045, 1048 (9th Cir. 2003) (petitioner not entitled to statutory tolling during period between the completion of the first round of his state habeas petitions and the start of the second round of his state habeas petitions); *King v. Roe*, 340 F.3d 821, 823 (9th Cir. 2003) (no tolling between the denial of one round of petitions and the commencement of the next round where the subsequent petition is not offered to simply remedy deficiencies in the prior petition). Thus, petitioner is not entitled to tolling during the interval between his two rounds state habeas petitions.

Petitioner is also not entitled to statutory tolling while his second petition to the California Supreme Court was pending. First, the United States Supreme Court has indicated that petitioner is entitled to tolling during "one full round" of collateral review. *See Carey v. Saffold*, 536 U.S. at 222. The Court has not held that petitioner is entitled to statutory tolling while his subsequent rounds of collateral review are pending. However, even assuming AEDPA permits statutory tolling during subsequent rounds of collateral review, a petitioner is entitled to statutory tolling only while a "properly filed" state habeas petition is pending. 28 U.S.C. § 2244(d)(2). A petition that is denied as untimely is not properly filed and petitioner is not entitled to statutory tolling while an untimely petition is pending. *Pace v. DiGuglielmo*, 544 U.S. 408, 417 (2005) ("[W]e hold that time limits, no matter their form, are 'filing' conditions. Because the state court rejected petitioner's PCRA petition as untimely, it was not 'properly filed,' and he is not entitled to statutory

tolling under 28 U.S.C. § 2244(d)(2)"); *see also Bonner v. Carey*, 425 F.3d 1145, 1149, amended by 439 F.3d 993 (2006) (where state court denied petition for, among other reasons, untimeliness, petition was not "properly filed" and petitioner was not entitled to statutory tolling). Petitioner's July 18, 2006 habeas petition to the California Supreme Court was summarily denied on August 16, 2006 with citation to *In re Robbins*, 18 Cal.4th 770, 780 (1998) (discussing the timeliness requirements for state habeas petitions), indicating that the petition was denied for, among other reasons, untimeliness. (Petition, Ex. 43). Accordingly, petitioner receives no statutory tolling for the time his second petition to the California Supreme Court was pending.

Petitioner also does not receive tolling for the time period which his first federal petition was pending. The one-year limitations period is not tolled during the time a federal habeas petition is pending. *Duncan v. Walker*, 533 U.S. 167, 181 (2001) (holding that an unexhausted federal habeas petition did not toll AEDPA statute of limitations).

In summary, the statute of limitations ran for ten days until petitioner filed his first habeas petition in the superior court on June 9, 2005 and was then tolled until June 14, 2005 when that petition was denied. The statute then ran again for another 310 days until April 20, 2006 when petitioner filed a habeas petition in the California Court of Appeal. It was then tolled a second time until June 21, 2006 when the California Supreme Court denied his habeas petition. At that point, the one year federal statute of limitations had been running for 320 days and petitioner had 45 more

days, or until August 5, 2006 to timely file a federal petition. Accordingly, this federal petition, filed on October 18, 2006, is untimely.

2. Equitable Tolling

Petitioner is not entitled to equitable tolling of the one-year AEDPA statute of limitations.

A petitioner seeking equitable tolling of the AEDPA statute of limitations bears the burden of showing that equitable tolling is appropriate. *Raspberry v. Garcia*, 448 F.3d 1150, 1153 (9th Cir. 2006). Equitable tolling is justified in few cases and "the threshold necessary to trigger equitable tolling [under AEDPA] is very high, lest the exceptions swallow the rule.'" *Spitsyn v. Moore*, 345 F.3d 796, 799 (9th Cir. 2003) (citation omitted). Equitable tolling should only be granted where "extraordinary circumstances" and external forces beyond a prisoner's control, rather than a petitioner's lack of diligence, make it impossible to file a timely petition. *Id.* Thus, "a litigant seeking equitable tolling bears the burden of establishing two elements: (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way." *Pace v. Diguglielmo*, 544 U.S. 408, 418 (2005). The extraordinary circumstances must be "the cause of [the] untimeliness." *Spitsyn v. Moore*, 345 F.3d at 799.

Petitioner has not demonstrated that he was diligent in pursuing his rights or that "extraordinary circumstances" caused his untimeliness. Instead, petitioner delayed ten months after the superior court denied his first habeas petition before filing a petition

for a writ of habeas corpus in the California Court of Appeal. Petitioner also failed to timely raise all his habeas grounds in his first petition to the California Supreme Court, despite the fact that those grounds are based on facts known to petitioner prior to his conviction becoming final. Equitable tolling is not warranted.[7] The petition is time-barred.

RECOMMENDATION

In accordance with the foregoing, it is recommended that the court issue an order: (1) accepting this report and recommendation; and (2) directing that judgment be entered denying and dismissing the petition with prejudice.

DATED: 1/29/07

/s/
Carolyn Turchin
UNITED STATES MAGISTRATE JUDGE

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[7] Even if petitioner were to receive equitable tolling for the entire time his petition in case number 06-4610 was pending in this court, his current petition would still be untimely. The petition in case number 06-4610 was filed on July 24, 2006, 33 days after petitioner had completed his first full round of post-final conviction collateral review in state court. Thus, if petitioner received equitable tolling while case 06-4610 was pending, he would have had 12 days remaining, or until September 23, 2006 to file his current petition.

APPENDIX F

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CV 06-6616-SVW(CT)

[Filed February 12, 2007]

WILLIAM LEADER,	)
Petitioner,	)
	)
v.	)
	)
DIRECTOR OF CORRECTIONS	)
AND WARDEN OF LOS ANGELES	)
COUNTY,	)
Respondents.	)
PEOPLE OF THE STATE OF	)
CALIFORNIA	)
	)

Written Statement of Objections To U.S. Magistrate Judge, Hon. Carolyn Turchin's Report and Recommendations on Petition for Writ of Habeas Corpus; Memorandum of Points and Authorities In Support Thereof

Petitioner hereby objects to the Magistrate Judge, Hon. Carolyn Turchin's recommendation to the District Judge filed on 01/29/2007, that this petition for a writ of habeas corpus be denied and dismissed

with prejudice for reasons as explained herein below. He wishes to add and disagree with some critical aspects of its discussion section; and finally to make some corrections on its report under its "Summary of Prior Proceedings".

The Hon. Carolyn Turchin's recommendation that the United States District Court issue an order: (1) accepting her report and recommendation filed on 01/29/2007, and (2) directing that judgment be entered denying and dismissing the petition with prejudice was ill advised.

INTRODUCTION

On September 8th, 2006, Health and Safety Code Section 11156, the statute on which appellant/ defendant William Leader was convicted on January 31, 2001, was amended by the enactment of Assembly Bill 2198, on 09/20/2006. The bill revised the prohibition against prescribing, administering or dispensing a controlled substance to an addict or habitual user to delete the reference to a habitual user. The Legislature found and declared that the under-treatment of pain, including the use of opioids, is a continuing problem in the State of California, and some terms of the Intractable Pain Act are outdated and confusing.

MEMORANDUM OF POINTS AND AUTHORITIES

Objection # 1 as to when limitations' clock starts

Petitioner objects to this report's finding that the limitations' clock started on May 29th, 2005

STARTING THE CLOCK

This issue is covered very well in the California Criminal Appellate Practice Manual, © 2006, Appellate Defenders, Inc. Federal Habeas Corpus, at page 8, in its section A, where it instructs:

111: AEDPA TIME LIMITS
FOR FILING FEDERAL PETITION

Starting the Clock. Section. [9.5]

"The most common trigger for starting the limitations clock is the conclusion of direct review or expiration of the time for seeking it. (28 U.S.C. Section 2244(d)(l)(A).) As applied to California, the state appeal process includes time for petitioning for review in the California Supreme Court and for certiorari in the United States Supreme Court. The state appeal process is final at the end of the 90-day period in which to file a certiorari petition after the denial of review or, if certiorari is sought, at the time the court acts on it. (E.g., *Beard v. Banks* (2004) 542 U.S. 406, 411; *Caspari v. Bohlen* (1994) 510 U.S. 383, 390; *Bowen v. Roe* (9th Cir. 1999) 188 F. 3d

> 1157,1158-1159; *see also Clay v. United States* (2003) 537 U.S. 522, 525 [similar timing for a 28 U.S.C. section 2255 motion for relief from federal convictions]; caveat: see *White v. Klitzkie* (9th Cir. 2002) 281 F.3d 920, 924-925 [in contrast to rule applicable to appeal, certiorari from denial of state habeas petition is not part of state *collateral* proceedings].)"

Final judgment in this case was on May 28, 2005. Petitioner had a right to directly petition for a writ of certiorari pursuant to Rule 10[c] of the United States Supreme Court Rules in the United States Supreme Court, on many important questions of federal law that had not been, but should have been, settled by the United States Supreme Court, regarding this final judgment, or that final judgment decided these important federal questions in a way that conflicted with relevant decisions of the United States Supreme Court.

At pages 6, and 7, under the discussion section, from line 2 to line 2, this report stated: "...petitioner' s final sentence, after the Appellate Division twice remanded for re-sentencing, was not imposed until April 28, 2005. Petitioner had 30 days to file an appeal of the judgment. *See* Cal. Rules of Court, Rule 182, 532(a). He did not do so and his conviction became final on May 28, 2005. The statute of limitations began to run the following day, and a properly filed petition was due one year later, on our about May 30, 2006. *See Patterson v. Stewart*, 251 F.3d 1243, 1246 (9th Cir. 2001) holding Fed. R. Civ. P. (6)(a) applies to petitions subject to the AEDPA.

Petitioner's conviction did not become "final on May 28, 2005," as incorrectly alleged by this Court in its report; nor has this petitioner ever contended as also incorrectly alleged under footnote 4, on page 6, on lines 14 and 15, that "his conviction was not final until 90 days after the judgment."

Entry of final judgment on the other hand in petitioner's case occurred on May 28, 2005. Petitioner did allege at page 5, in his Opposition to the City's Motion to Dismiss Petition for a Writ of Habeas Corpus, from line 10 to above line 13, that "From May 28, 2005, for 90 days, until August 26, 2005, petitioner had the right to directly petition for a writ of certiorari, pursuant to Rules 10[b], and [c], and Rules 13(1) and (3), of the United States Court Rules, in the United States Supreme Court."

This report only cites to one of the four cases *supra*, cited in the practice manual, *Bowen v. Roe* (9th Cir. 1999) 188 F. 3d 1157,1158-1159. The holding of that *Bowen* case is asserted by the report, but not refuted by the report. (Footnote 4, page 6). The Appellate Practice Manual's central certiorari point is completely ignored by this report at all points in this report.

The best that this report offers related to this issue are some *dicta* in the case *Smith v. Duncan*, 297 F. 3d 809, 812-813 (9th Cir. 2002). But the issue here is not when a conviction or a judgment became final. The relevant point is whether or not petitioner had the right to petition for a writ of certiorari after his judgment became final, despite the fact that he did not appeal the sentence. If he did have that right, the limitation's clock started 90 days subsequent to that

final judgment, and it is prejudicial error to dismiss this case on the statute of limitations if this Court accepts this report's accurate finding that the 29 day period in which the California Supreme Court had petitioner's first habeas petition under submission, was a pending period. That 29 day period has been conceded by respondents also.

This report asserted further that "the statute of limitations began to run the following day, and...", quoted *supra*. This petitioner disagrees. The statute of limitations began to run on August 27, 2005, after the time expired in which petitioner could petition for a writ of certiorari. on entry of final judgment on May 28, 2005, pursuant to Rule 10[c] of the United States Supreme Court Rules.

The 01/29/2007, recommendation, instead of reading section 2244(d)(2) with historical practice in mind, ignores the unbroken line of cases in which the U.S. Supreme Court has expounded the importance of its jurisdiction to review state court decisions that implicate federal law. As a result this report is recommending that this District Judge effectively read the U.S. Supreme Court's role out of the state post-conviction and post-sentencing process, losing sight of the fact that "the time honored practice of appellate review of state-court judgments [is] consistent with this Court's role in our federal system." *McKesson*, 496 U.S at 28.

Objection # 2

Petitioner objects to the Magistrate's report's complete omission of even mention or consideration of

the issue as to whether under Section 2244(d)(2), the statute of limitations is tolled from the filing of an application for state post-conviction or other collateral relief until the consideration of the time for seeking Supreme Court review of the state's final judgment on that application independent of whether the petitioner actually petitions the Supreme Court to review the case.

This issue was covered on page 12 under section D, headed: "END OF TOLLING" in his Opposition to Motion to Dismiss Petition for Writ of Habeas Corpus. It was not correct for the Magistrate Judge's report to completely ignore this whole issue, and not to mention nor discuss it once in the whole report. If this time is tolled and available to petitioner, his petition would be timely, based on the court's summary otherwise on page 11. Petitioner requests that this issue receives its correct consideration, requesting hereby that the section D referenced above be incorporated into these objections here, and that the report issues a statement of finding on this issue. The time period in question based on this report's estimate of when the state's final judgment on his application was, would be the 90 days subsequent to the denial of petitioner's first Habeas Corpus petition in the Supreme Court of California on June 21, 2006.

Objection # 3

Petitioner objects to the Magistrate Judge's report ruling that there has been a proper final judgment in this case.

The report never addressed the pertinent issue which was that count 3 was properly and timely appealed on June 25, 2004, to the Appellate Department correctly, (see page 3, reason 2), yet it never received a ruling from that court and so still remains in limbo. Correct procedure must be followed in our state courts, and this court now can't correctly simply ignore this valid procedural issue. See footnote 2, on page 3, which stated:

> "On May 9,2003, the trial court suspended petitioner's sentence on Count 3 and ordered probation conditioned on petitioner's surrendering May 13, 2003, and obeying all laws. The court ordered bail. Petitioner's probation was subsequently terminated on May 13, 2003 when he surrendered as ordered and posted bail. (Motion to Dismiss, Ex. A at 48)".

However, the report missed the relevant point. The issue is not what the sentence on count 3 was on May 9, 2003, as cited in the report as if the substance of the sentence was the issue. The relevant issue is that the sentence on count 3, regardless of whatever it was, was properly and timely appealed to the Appellate Department of the Superior Court and that Department did not rule on Count 3, nor set forth on the record a reason for not doing so, and so the trial court did not nor could not re-sentence on Count 3. Therefore, there has been no proper final judgment in this case. All counts need their sentence to have a final judgment.

In an analogous manner to the way in which the Appellate Department on January 12, 2005, ruled that

"the trial court shall impose a sentence as to count 14 or set forth on the record a reason for not doing so" subsequent to petitioner filing an appeal on June 3, 2003, in the Appellate Division, seeking direct review of the sentence on count 14 on May 9th 2003, so too must this court now recommend and order that there has been no proper final judgment in this case, and so the limitation's clock has not yet started to run. This is simply correct legal procedure.

Conclusion

This report's recommendation directing that a judgment be entered denying and dismissing the petition with prejudice is unsafe and error.

Dated: 02/ 12 / 2007,

By: /s/_____

Will Leader
In Pro Per

APPENDIX G

UNITED STATES DISTRICT COURT
FOR THE NINTH CIRCUIT
CENTRAL DISTRICT OF CALIFORNIA

No. 06-6616-SVW(CT)

[Filed April 25, 2007]

William Leader,	)
Petitioner,	)
	)
v.	)
	)
Director, California Dept. of	)
Corrections, Lee Baca, Sheriff	)
Los Angeles County,	)
Respondents.	)
	)

Notice of Appeal
(Request for Certificate of)
Appealability

Notice is hereby given that appellant in pro per, William Leader, hereby appeals to the United States Court of Appeals for the Ninth Circuit, or hereby appeals to this United States District Court for permission to appeal to the United States Court of Appeal for the Ninth Circuit, or that appellant hereby

petitions for a certificate of appealability from this United States District Court on the ***three issues*** relating to the statute of limitations cited in appellant's **objections** to the magistrate Judge Carolyn Churchin's proposed opinion, from the judgment by the United States District Court entered in this action on the 17th day of April, 2007,

Dated: 04/25/2007

Signed by: /s/_____
William Leader
In Pro Per

APPENDIX H

APPELLATE DIVISION
OF THE SUPERIOR COURT
STATE OF CALIFORNIA
COUNTY OF LOS ANGELES

BR 042827
Compton Trial Court
No. 0CR01126

[Filed January 12, 2005]

PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent,

v.

WILLIAM LEADER,
Defendant and Appellant.

MEMORANDUM JUDGMENT

This cause having been submitted for decision, and fully considered, judgment is ordered as follows:

The sentence is affirmed as to counts 1, 2 and 12. The sentence is reversed as to counts 4, 5, 6, 7, 8, 9, 10, 11 and 13. The case is remanded for sentencing on those counts. Further, the trial court shall impose a

sentence as to count 14 or set forth on the record a reason for not doing so.

Appellant and defendant William Leader appeals from the judgment, following remand of the matter by this court for resentencing.

BACKGROUND

Appellant was a licensed medical doctor. He was charged in a misdemeanor complaint with sixteen counts of violating Health and Safety Code section 11356, prescribing a controlled substance to an addict or habitual user. Prior to trial, two counts were dismissed. (Pen. Code, § 1385.)

* * *

APPENDIX I

APPELLATE DEPARTMENT
OF THE SUPERIOR COURT
COUNTY OF LOS ANGELES
STATE OF CALIFORNIA

No. BR 042827

[Filed June 25, 2004]

PEOPLE, Plaintiff-respondent,	)
v.	)
WILLIAM LEADER, Defendant-appellant.	)

HON. JOSH M. FREDRICKS
Dept. 56

OPENING BRIEF OF APPELLANT

1. INTRODUCTION: This appeal is made in part pursuant to P.C. 1237, its (a) & (b) sections in full, & P.C. 1181(5), 1.1. Appellant hereby appeals 2 of the trial court rulings on 5/8/03, denying a motion for a new trial (2003RT. p. 17, 1.19), & a request to dismiss/ vacate judgment, (2003RT. p.6, 1.20); & the re-sentence on 5/9/03, (2003RT. p109, 1.2).

11. STATEMENT OF THE CASE: On July 27, 2000, Appellant was charged with misdemeanor violations of Health & Safety Code section, [hereinafter "H & S"] 11156, *Div. 10*, involving two patients. Each patient saw appellant for therapy, was diagnosed with medical disorders & was prescribed controlled substances. Appellant was convicted on 1/31/01, on 14 counts & sentenced on 2/5/01, to five years in custody by running five one-year sentences consecutively. After appeal on 11/21/2002, this Court affirmed the conviction but remanded the matter to the trial court for re-sentencing. On 5/8/03, the trial court heard testimony from 7 witnesses on the issue of not only an appropriate sentence, but also heard argument on 3 issues unrelated to sentencing. [See Defendant's Sentencing Brief & Request for Post-Trial Evidentiary Rulings.] It ruled on these issues, which included the impact of the Californian Supreme Court's landmark case on Evid. Codes 502, ***People v. Mower*, (2002) 28 Cal.4th 457**, & the statute of limitations (sol) issue. Appellant was subsequently re-sentenced to incarceration for 3 years, again based upon one-year sentences to run consecutively; but this time on 3 counts only.

* * *